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IN THE

Supreme Court of the United States

October Term, 1963

No. 134

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner Joseph Sica prays that this Court grant rehearing of its order of June 1, 1964, denying the Petition for Certiorari (this petition filed pursuant to Rule 58 of this Court), and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case, as prayed for in the Petition filed February 13, 1963.

Reasons for Granting Rehearing and Issuing the Writ.

1. That this Court on May 4, 1964,[1] reversed a conviction for crime which was obtained by the use of evidence of an eavesdropping nature which this Court

[1] *Clinton v. Virginia*, on Writ of Certiorari to the Supreme Court of Appeals of Virginia, No. 294, decided May 4, 1964, *per curiam*. The motion to strike the supplemental brief on behalf of the respondent is denied. The judgment is reversed. *Silverman v. United States*, 365 U. S. 505; *Ker v. California*, 374 U. S. 23. Mr. Justice Clark concurring. Since the court

held improper on the authority of *Silverman v. United States*, 365 U. S. 505; *Ker v. California*, 374 U. S. 23.

This Court in this session has again reaffirmed its zealous protection of individuals under the Fourth and Fifth Amendments, and as was said in the concurring opinion of Mr. Justice Warren, 373 U. S. 444, *Lopez v. United States*, 373 U. S. 427:

> "This court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie—in crime—to induce admissions from a suspect, but suffice it to say here the issue is substantial. We have already struck down the use of psychological pressures and appeals to friendship to induce admissions or confessions under not totally dissimilar circumstances."
>
> (Citing *Leyra v. Denno*, 347 U. S. 556; *Spano v. New York*, 360 U. S. 315.)

In this case, it must be remembered "the informer was the vehicle, whereby the accused's statements were transmitted to a third party whose subsequent testimony was evidence of the statement."

It should be borne in mind that Leonard, the witness, working with the police and acquainted with Daley made the statements to Daley concerning Sica. The police were standing by, had equipped Leonard with recording equipment, and he had approached Daley in his room at the hotel and apparently attempted to induce Daley to make certain statements by reason of suggested ques-

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finds that the spike mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment. Mr. Justice White dissents.

tions, which Leonard put to Daley, questions suggested by the police, by whom he had been equipped with a recording device and the police were listening.

As was said:

"(a) Leonard: Joe Sica scared the S- out of Manuel yesterday. He called Manuel up and Manuel doesn't even know Joe Sica. He says, yeah, you're working for shithill, and he says he is not going to be around there long cause you a lot of trouble. When you are working with him scared S- out of him. You know I am used to these guys * * * calling me now (laughter) but Manuel doesn't know what the hell it is. I guess—Daley: How does he know Manuel? Does he know Manuel?

Leonard: No, he only saw him once in his life about ten years ago at some doings. He happened to be there or something and was introduced.

Daley: My God, is that what he did;

Leonard: Yeah.

Daley: That's a stupid thing.

Leonard: And then you know he wanted to meet Chargin, for what I don't know. He wanted to see Chargin the minute he gets into town, something I guess (***) (The asterisk indicates unintelligible word or phrase)

Daley: Oh, forget him.

Leonard: Get him (***)

Daley: Who did he say he wanted to see?

Leonard: He told Manuel he wanted to see—

Daley: He told who?

Leonard: He told Manuel he wanted to see Chargin right away.

Daley: (Laughter)" [C. T. 1358-59].

While talking from his hotel room, Daley ordered breakfast or lunch, which was recorded [C. T. 1363]. There were other extensive conversations relating to Gibson, Carbo [C. T. 1359, 1361-62]. A portion of the conversation relating to Sica is as follows:

"Daley: He don't know Mickey or anybody.

Leonard: No, uh-huh, no, the other day is the first time he ever met Joe Sica, and when Blinkey walked in first with Dragna he just walked out. Don did, and Blinkey didn't try to stop him or talk to him or anything. Then the next day when he came in with Sica, well, he said, 'I'm going to sit down and talk with you', so he sat down for about an hour, I guess, but Blinkey was screaming and hollering 'It's not the money, we want to know what you are going to do with the fighter. We want the money, but we want to know who he is going to fight and where he is going to fight or who he is going to fight.'" [C. T. 1376].

"Daley: So he must have??

Leonard: Old Joe Sica was at the gym yesterday.

Daley: Downtown?

Leonard: Uh-huh. Telling everybody, going around.

Daley: Was he?

Leonard: Yes. What he started to do is start a campaign around.

Daley: Yeah.

Leonard: But he told one guy he says, 'Jack is not getting away with this.' He says, 'Well, liable to get hurt over this thing.' I don't know why it is any of his business but make it somebody's

business in order to do Blinkey a favor, you know, in order to—

Daley: Well, then people in New York do them favors.

Leonard: Yeah. Then I guess Blinkey's connected with what—the longshore outfit." [C. T. 1387, 1388].

We respectfully quote a portion of the dissenting opinion of Mr. Justice Brennen in *Lopez, supra,* 373 U. S. 427, 450:

"The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches. The compelled disclosure of private communications by electronic means ought equally to be subject to legal regulation, and if this principle is granted I see no reasoned basis for reaching different results depending upon whether the conversation is with a private person, with a Federal undercover agent (On Lee) or with an avowed Federal agent as here."

Further quoting:

"It is in light of the Enlick decision[2] that a Government ought not to have the untrammeled right to extract evidence from people. Thus viewed the Fourth Amendment is complimentary to the Fifth (citing *Feldman v. United States,* 322 U. S. 487, 489, 490.) The informing principle of both amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion."

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[2]See *Enlick v. Carrington,* 19 Howells State Trials, 1029 (C. P. 1765) cited in Mr. Justice Brennen's dissenting opinion in *Lopez v. United States, supra.*

2. The Court should grant a hearing in order to decide whether the prosecution made a charge in the indictment as to the bad reputation of the defendant and put in as part of its case in chief evidence of the reputation of the defendant without the defendants having ever put their reputations in issue.

We respectfully contend that the indictment alleging as we have just recited the bad reputation of the defendant, particularly Sica, and the permission given by the trial court to permit evidence by the witnesses that they had "known the reputation of Sica to have been an underworld reputation." As Leonard said, "by reputation I have always known of Joe Sica as an underworld man and a strong-arm man." [R. T. 722].

Nesseth testified over objection, "I knew Sica by reputation only as being an underworld figure" [R. T. 1865].

The opinion of the learned Circuit Court below is against decisions of other jurisdictions, namely, *Michaelson v. United States*, 335 U. S. 469, adopted with approval in *Benton v. United States*, 233 F. 2d 491 (4th Cir., 1956).

In *United States v. Sweeney*, 262 F. 2d 272, 3rd Circuit, decided 1959, discussing a conviction under 18 U. S. C. 1951, Subparagraph (a), Subparagraph (b), the Court said:

> "The trouble in this case is that the rebuttal testimony, while tending to prove that Sweeney lied also tended to show that he was a bad man full of violent deeds. It came at the very close of the case, it was not limited by the trial court's charge in any way assuming that such limitation

> would have saved it. Sweeney may well be an overbearing citizen with a short temper, but if he is to be convicted under the Hobbs Act, it must be for offenses under that Act, not because of his general propensity to commit assault and battery. With regret we think that the error in the admission of this testimony was so highly prejudicial that we must reverse the judgment and remand the case for a new trial."

We assert that this results in an unjustifiable discrimination between persons in different jurisdictions. This all important question should be resolved by this Court.

3. This testimony was aggravated by the Calla incident fully covered in our Petition concerning Leonard's testimony that Stanley came to his office and told him that Calla had been in the penitentiary in Cleveland for murder (in rebuttal) [R. T. 6260, 6261, 6360, photograph of Calla]. The evidence of the witness Chargin as to the anonymous phone call attributed to these defendants. The identity of the caller was never established, even remotely [R. T. 2237; 2239]. Added to the reputation evidence this successfully denied to Sica all vestige of that fair trial to which he was entitled under the Constitution and its Amendments. We have apparently not thoroughly brought this to the Court's attention, but respectfully urge that this alone should be grounds for a rehearing in the granting of certiorari in this case. The decision of the Ninth Circuit should not be allowed to stand.

(A) The petitioner Sica was denied a fair trial in that the successor judge who passed upon the motions after the untimely death of the trial judge without ever

having seen or heard the witnesses (Rule 25, Federal Rules of Criminal Procedure) was particularly applicable to Sica, for there was a sharp conflict between he and the witnesses because of the fact that he took the stand and testified. This all important point is one of first impression, we respectfully urge, and should be decided by this court.

Conclusion.

For the reasons set forth above, and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

We understand other counsel on behalf of other petitioners are filing petition for rehearing, and may we respectfully ask the Court to adopt the arguments and authorities cited in such petitions for rehearing in our behalf insofar as they may be applicable.

Respectfully submitted,

RUSSELL E. PARSONS,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the Rules of this Court.

RUSSELL E. PARSONS